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In the Supreme Court

OF THE

United States

OCTOBER TERM, 1996

UNITED STATES SECURITIES AND EXCHANGE COMMISSION,
Plaintiff-Appellee,

VS.

H THOMAS FEHN,
Defendant-Appellant.

On Petition to the United States Court of Appeal for the Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

FIELDS, FEHN & SHERWIN
GREGORY J. SHERWIN
11755 Wilshire Boulevard
15th Floor
Los Angeles, California 90025
(310) 473-6338
Attorneys for Defendant-Appellant.

Bowne of Los Angeles, Inc., Law Printers (213) 627-2200

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QUESTIONS PRESENTED

1. Do the federal securities laws require a person to admit guilt of an uncharged crime in a disclosure document, notwithstanding the Fifth Amendment privilege against self-incrimination?

2. Does this Court's holding in *Central Bank of Denver v. First Interstate Bank of Denver* apply to civil enforcement actions brought by the SEC? If so, may the Private Securities Litigation Reform Act of 1995 be applied retroactively to justify an injunction against future violations of the federal securities laws, based solely upon an isolated incident in 1988 that did not constitute a past violation of the law?

3. Does a Circuit Court of Appeals violate an appellant's due process rights by retroactively applying, *sua sponte*, legislation enacted after the appeal has been taken under submission, without allowing the appellant an opportunity to brief or argue the issue, so that he could demonstrate that the retroactive use of the statute violated this Court's recent pronouncements on the question?

PARTIES TO THE PROCEEDING

H Thomas Fehn and the United States Securities and Exchange Commission.

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UNITED STATES SECURITIES AND EXCHANGE COMMISSION,
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PETITION FOR WRIT OF CERTIORARI

Petitioner H Thomas Fehn ("Fehn") respectfully petitions for a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit.

OPINION BELOW

The findings of fact and conclusions of law and final judgment and order of permanent injunction of the United States District Court for the District of Nevada are unreported and are reproduced in Appendix C. The United States Court of Appeals for the Ninth Circuit issued a published opinion in this matter. The opinion is reported at 97 F.3d 1276 and is reproduced in Appendix A.

STATEMENT OF JURISDICTION

The Court of Appeals entered its judgment on October 9, 1996. Petitioner filed a timely petition for rehearing and suggestion for rehearing *en banc*, on November 25, 1996. The Court of Appeals denied the petition for rehearing and rejected the suggestion for rehearing *en banc* by an order, filed on February 21, 1997, which is reproduced in Appendix B. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Amendment V to the U.S. Constitution provides in relevant part:

No person . . . shall be compelled in any criminal case to be a witness against himself, . . .

Section 10(b) of the Securities Exchange Act of 1934 [15 U.S.C. § 78j(b)] provides:

> It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce or of the mails, or of any facility of any national securities exchange —
>
> (b) To use or employ, in connection with the purchase or sale of any security registered on a national securities exchange or any security not so registered, any manipulative or deceptive device or contrivance in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors.

SEC Rule 10b-5 [17 C.F.R. § 240.10b-5] provides:

> It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of

interstate commerce, or of the mails, or of any facility of any national securities exchange,

(a) to employ any device, scheme, or artifice to defraud,

(b) to make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, or

(c) to engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person, in connection with the purchase or sale of any security.

Section 13(a)(2) of the Securities Exchange Act of 1934 [15 U.S.C. § 78m(a)(2)] provides:

Every issuer of a security registered pursuant to section 12 of this title shall file with the Commission, in accordance with such rules and regulations as the Commission may prescribe as necessary or appropriate for the proper protection of investors and to insure fair dealing in the security —

(2) Such annual reports (and such copies thereof), certified if required by the rules and regulations of the Commission by independent public accountants, and such quarterly reports (and such copies thereof), as the Commission may prescribe.

Section 14(a) of the Securities Exchange Act of 1934 [15 U.S.C. § 78n(a)] provides:

It shall be unlawful for any person by the use of the mails or by any means or instrumentality of interstate commerce or of any facility of a national securities exchange or otherwise, in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection

of investors, to solicit or to permit the use of his name to solicit any proxy or consent or authorization in respect of any security (other than an exempted security) registered pursuant to section 12 of this title.

SEC Rule 14a-9(a) [17 C.F.R. § 240.14a-9(a)] provides:

No solicitation subject to this regulation shall be made by means of any proxy statement, form of proxy, notice of meeting or other communication, written or oral, containing any statement which, at the time and in the light of the circumstances under which it is made, is false or misleading with respect to any material fact, or which omits to state any material fact necessary in order to make the statements therein not false or misleading or necessary to correct any statement in any earlier communication with respect to the solicitation of a proxy for the same meeting or subject matter which has become false or misleading.

Section 15(d) of the Securities Exchange Act of 1934 [15 U.S.C. § 78o(d)] provides:

Each issuer which has filed a registration statement containing an undertaking which is or becomes operative under this subsection as in effect prior to the date of enactment of the Securities Acts Amendments of 1964, and each issuer which shall after such date file a registration statement which has become effective pursuant to the Securities Act of 1933, as amended, shall file with the Commission, in accordance with such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors, such supplementary and periodic information, documents, and reports as may be required pursuant to section 13 of this title in respect of a security registered pursuant to section 12 of this title . . . .

Section 21(d)(1) of the Securities Exchange Act of 1934 [15 U.S.C. § 78u(d)(1)] provides:

> Whenever it shall appear to the Commission that any person is engaged or is about to engage in any acts or practices constituting a violation of any provision of this title, the rules or regulations thereunder, the rules of a national securities exchange or registered securities association of which such person is a member or a person associated with a member, the rules of a registered clearing agency in which such person is a participant, or the rules of the Municipal Securities Rulemaking Board, it may in its discretion bring an action in the proper district court of the United States, the United States District Court for the District of Columbia, or the United States courts of any territory or other place subject to the jurisdiction of the United States, to enjoin such acts or practices, and upon a proper showing a permanent or temporary injunction or restraining order shall be granted without bond. The Commission may transmit such evidence as may be available concerning such acts or practices as may constitute a violation of any provision of this title or the rules or regulations thereunder to the Attorney General, who may, in his discretion, institute the necessary criminal proceedings under this title.

Section 32(a) of the Securities Exchange Act of 1934 [15 U.S.C. § 78ff] provides:

> Any person who willfully violates any provision of this title (other than Section 30A), or any rule or regulation thereunder the violation of which is made unlawful or the observance of which is required under the terms of this title, or any person who willfully and knowingly makes, or causes to be made, any statement in any application, report, or documents required to be filed under this title or any rule or regulation thereunder or any undertaking contained in a registration statement as provided in sub-

> section (d) of section 15 of this title or by any self-regulatory organization in connection with an application for membership or participation therein or to become associated with a member thereof, which statement was false or misleading with respect to any material fact, shall upon conviction be fined not more than $1,000,000 or imprisoned not more than 10 years, or both, except that when such person is a person other than a natural person, a fine not exceeding $2,500,000 may be imposed; but no person shall be subject to imprisonment under this section for the violation of any rule or regulation if he proves that he had no knowledge of such rule or regulation.

Section 104 of the Private Securities Litigation Reform Act of 1995 added the following new subsection to 15 U.S.C. § 78t:

> (f) Prosecution of persons who aid and abet violations. For purposes of any action brought by the Commission under paragraph (1) or (3) of Section 78u(d) of this title, any person that knowingly provides substantial assistance to another person in violation of a provision of this chapter, or of any rule or regulation issued under this chapter, shall be deemed to be in violation of such provision to the same extent as the person to whom such assistance is provided.

Rule 34(a) of the Federal Rules of Appellate Procedure provides:

> Oral argument shall be allowed in all cases unless pursuant to local rule a panel of three judges, after examination of the briefs and record, shall be unanimously of the opinion that oral argument is not needed. Any such local rule shall provide any party with an opportunity to file a statement setting forth the reasons why oral argument should be heard. A general statement of the criteria employed in the administration of such

local rule shall be published in or with the rule and such criteria shall conform substantially to the following minimum standard:

Oral Argument will be allowed unless

(1) the appeal is frivolous; or

(2) the dispositive issue or set of issues has been recently authoritatively decided; or

(3) the facts and legal arguments are adequately presented in the briefs and record and the decisional process would not be significantly aided by oral argument.

STATEMENT OF THE CASE

On April 1, 1994, the district court, in a Securities and Exchange Commission enforcement action, entered a judgment of permanent injunction against H Thomas Fehn, an attorney, based upon a finding that, in 1988, he aided and abetted a client who failed to admit, in a '34 Act report, that he was guilty of uncharged criminal conduct.[1] Less than three weeks later, this Court held, in *Central Bank of Denver v. First Interstate Bank of Denver*, 511 U.S. 164, 114 S.Ct. 1439 (1994), that there is no civil liability for persons who aid and abet others who violate the Exchange Act. Fehn appealed to the Ninth Circuit Court of Appeals and argued, *inter alia*, that the holding in *Central Bank of Denver* applied to SEC enforcement actions (as suggested by Justice Stevens, in his dissenting opinion) and, consequently, the judgment against him should be reversed.[2]

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[1]The district court's jurisdiction was based on Sections 21(d) and 27 of the Securities Exchange Act of 1934 [15 U.S.C. §§ 78u(d) and 78aa].

[2]The Ninth Circuit's jurisdiction was based on 28 U.S.C. § 1291 and entry of a final judgment against Petitioner Fehn.

Fehn's appeal was argued and submitted on October 17, 1995. Two months later, Congress passed the Private Securities Litigation Reform Act of 1995, authorizing the SEC to bring injunctive actions against those who knowingly provide substantial assistance to another person in violation of the securities laws. Ten months later, the Ninth Circuit issued its opinion and, without giving Fehn the opportunity to either brief or argue the issue, applied the new legislation retroactively to affirm the judgment of permanent injunction against Fehn.

In issuing the permanent injunction against Fehn, the district court found that Fehn had aided and abetted his client in the preparation and filing with the SEC of three quarterly reports that failed to disclose the client's earlier violations of federal and state securities laws in connection with the original public offering of securities. Fehn was originally hired to represent the client in connection with an SEC investigation. During the course of the investigation, Fehn learned facts that exposed the client to criminal liability and he counselled the client on the Fifth Amendment privilege against self-incrimination. Fehn discovered that the client was unaware of the reporting requirements under the Exchange Act and that no required reports had been filed. Additionally, Fehn was advised that an FDA embargo on the client's main product had not been publicly disclosed by the client's company. Fehn urged the client to make the public disclosure and to file the required quarterly reports with the SEC. Fehn played a minimal role in the drafting and filing of the quarterly reports (although the district court determined Fehn's role to be substantial assistance). The reports made proper disclosure of the FDA embargo, but they did not disclose that Fehn's client had committed acts, in connection with the original public offering, that would be criminal violations of federal and state securities laws. (The client was subsequently convicted for violating the Securities Act of 1933.)

Fehn argued in the courts below that his client was not required to admit, in a publicly filed document, that he was guilty of an uncharged crime, since such a requirement would violate the client's Fifth Amendment privilege against self-incrimination.[3] Consequently, there was no violation for Fehn to aid and abet. Fehn relied upon the Second Circuit decision in *United States v. Matthews*, 787 F.2d 38 (2d. Cir. 1986) to support his advice to the client. The district court and Ninth Circuit rejected Fehn's argument. In its opinion, the Ninth Circuit, in analyzing the determinative factors set forth by this Court in *California v. Byers*, 402 U.S. 424, 91 S.Ct. 1535, 29 L.Ed.2d 9 (1971) found that the disclosure requirements contained in Section 10(b) and 15(d) of the Securities Exchange Act do not regulate an activity that is "permeated with criminal statutes." Additionally, the Ninth Circuit determined that "although disclosure might have revealed past criminal violations in this case, the disclosure requirement does not, in general, mandate revelation of 'inherently illegal activity.'" The Court concluded that Fehn's client's Fifth Amendment privilege against self-incrimination was, therefore, not violated by the disclosure requirements of the Exchange Act. In reaching this decision, the Ninth Circuit failed to consider Section 32 of the Exchange Act [15 U.S.C. § 78ff] which makes *any* willful violation of the Act a crime punishable by severe penalties. Nor did the Court consider the provisions of Section 21(d)(1) of the Act [15 U.S.C. § 78u(d)(1)] which authorizes the SEC to transmit evidence of such acts or practices as may constitute a violation of any provision of the Act or regulations thereunder to the Attorney General, who may then institute the necessary criminal proceedings.

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[3] Although the District Court found that Fehn aided and abetted both the corporation and the individual principal, for all practical purposes they were one and the same. There was no independent ruling body that Fehn could advise on behalf of the corporation.

The Ninth Circuit attempted to distinguish *U.S. v. Matthews* by suggesting that the disclosure laws at issue in that case (Section 14(a) of the Exchange Act and Rule 14a-9 promulgated thereunder) differed from the disclosure requirements of Section 10(b) and Rule 10b-5 involved here. However, the operative language of the statute and rules is identical.

REASONS FOR GRANTING THE WRIT

This Court should grant the writ in order to resolve a split between the federal Circuit Courts of Appeals on an important constitutional issue involving the federal securities laws which require uniform application. In *U.S. v. Matthews, supra*, the Second Circuit suggested that the disclosure requirements of the Exchange Act do not require an admission of guilt of uncharged, criminal conduct, since such a requirement would violate the Fifth Amendment's privilege against self-incrimination. In this case, the Ninth Circuit has rejected that analysis and, in doing so, has misapplied this Court's holding in *California v. Byers, supra.* The compelled disclosure that is the foundation of the Court's finding of liability against Petitioner Fehn is not a simple recitation of neutral facts. *Cf., California v. Byers* (providing name and address at the scene of an accident). In this case, the courts below determined that Fehn's client was required to disclose, in a publicly filed document, that he had committed violations of federal and state securities laws, and had exposed his company to contingent civil liabilities. Such a public disclosure (in the midst of an SEC investigation) clearly confronted Fehn's client "with substantial hazards of self-incrimination" which entitled him to invoke the Fifth Amendment privilege. *See, California v. Byers, supra*, 402 U.S. at 429.

This Court should also grant the writ because the Ninth Circuit has decided a federal question in a way that conflicts

with recent, applicable decisions of this Court and, in so doing, has failed to recognize this Court's role as the authoritative interpreter of federal statutes. In *Central Bank of Denver, supra*, this Court reached "the uncontroversial conclusion . . . that the text of the 1934 Act does not itself reach those who aid and abet § 10(b) violations." (114 S.Ct. at 1448) Although *Central Bank of Denver* involved a private right of action under the Act, the principles of statutory construction that are at the heart of the decision apply with equal force to civil enforcement actions brought by the SEC. *See*, dissenting opinion of Justice Stevens. (*Ibid.*, 114 S.Ct at 1460) Under the holding of this Court in *James B. Beam Distilling Co. v. Georgia*, 501 U.S. 529, 111 S.Ct. 2439, 115 L.Ed.2d. 481 (1991), Fehn was entitled to the benefit of the *Central Bank of Denver* decision. The Ninth Circuit did not directly decide this issue. Instead, it affirmed the district court's judgment based on a retroactive application of a statute that was passed two months after Fehn's appeal had been fully briefed, argued and submitted for decision. In its retroactivity analysis of the statute, the Ninth Circuit ignored this Court's decisions in *Rivers v. Roadway Express, Inc.*, 511 U.S. 298, 114 S.Ct. 1510, 128 L.Ed.2d 274 (1994) and *Plaut v. Spendthrift Farm, Inc.*, 514, U.S. 211, 115 S.Ct. 1447, 131 L.Ed.2d 328 (1995). In *Rivers*, this Court stated that "[a] judicial construction of a statute is an authoritative statement of what the statute meant before as well as after the decision of the case giving rise to that construction." *Ibid.*, 114 S.Ct. at 1519. Thus, when this Court interpreted the Exchange Act in *Central Bank of Denver*, by deciding that it failed to provide any liability against aiders and abettors, its opinion is declarative of what the law has always been, notwithstanding a multitude of Circuit Court of Appeals decisions to the contrary. Nevertheless, in reaching its conclusion on the retroactive application of the Private Securities Litigation Reform Act of 1995, the Ninth Circuit stated that the new legislation

"may be said to restore the legal consequences that obtained at the time of the district court's judgment against Fehn" and that this Court's *Central Bank* decision only "temporarily eliminated" those legal consequences. (97 F.3d at 1286) This analysis does not pay due respect to this Court's authority to decide what a statute has always meant.

Thirdly, this Court should grant the writ because the Ninth Circuit has so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision. In rendering its opinion in this case, the Ninth Circuit *sua sponte* and without any notice to the parties, retroactively applied a statute enacted after the appeal had been fully briefed, argued and submitted for decision. Rule 34 of the Federal Rules of Appellate Procedure entitle a party to present oral argument to the Circuit Court of Appeals except in circumstances that are clearly not applicable here (frivolous appeal; recently authoritative decision; facts and legal arguments adequately presented in the briefs). The Ninth Circuit's decision on the retroactive application of the Private Securities Reform Act of 1995 is one of first impression at the appellate level. The Ninth Circuit made the decision without benefit of any argument by Appellant Fehn and, as noted above, the Ninth Circuit failed to consider recent relevant decisions of this Court. Since the Ninth Circuit decided the case a year after oral argument and ten months after passage of the new legislation, its failure to provide Appellant Fehn with any notice of its intended retroactive application of the statute cannot be excused. Moreover, in its retroactive application of the new statute, the Circuit Court made a factual finding on Defendant's *scienter*. Since the standard under the new statute (knowingly providing substantial assistance) is different than the "reckless" standard employed by the District Court, if it was proper to apply the new statute, the matter should have been remanded to the district court for further proceedings on this issue.

CONCLUSION

For the reasons stated, the petition for a writ of certiorari should be granted.

Dated: May 22, 1997

Respectfully submitted,

GREGORY J. SHERWIN
Counsel of Record
FIELDS, FEHN & SHERWIN
11755 Wilshire Blvd.
15th Floor
Los Angeles, California 90025
(310) 473-6338